Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-1844

ERNEST C. HAMILTON,

Petitioner,

versus

LOUISIANA STATE BAR ASSOCIATION,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Louisiana

---

PETITION FOR A WRIT OF CERTIORARI

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATES JUSTICES OF THE SUPREME COURT:

Petitioner, Ernest C. Hamilton, an Attorney at Law, petitions this Honorable Court to review the judgment and order of the Supreme Court of Louisiana, entered on the 7th day of April , 1977, fol-

lowing the denial of a timely filed petition for rehearing.

An application for a stay of the mandate and supersedeas has been made to and granted by the Supreme Court of Louisiana until May 17, 1977, which stay is to remain in effect until this cause is finally disposed of by this Court. (Appendix A)

OPINION BELOW

The opinion of the Supreme Court of Louisiana is reported at 343 So.2d 985-993, a copy of which is annexed hereto as Appendix B. The dissenting opinion of Mr. Justice Dennis of the said Supreme Court was made in a compenion case, Louisiana State Bar Association v. Shaheen, 338 So.2d 1347, 1354-56, a copy of which is annexed hereto as Appendix C.

JURISDICTION

This is an action for the disbar-

ment of the Petitioner, Ernest C. Hamilton, following his conviction in the United States District Court for the Eastern District of Louisiana for violation of 18 U.S.C. §371 relative to conspiracy to commit mail fraud. The Louisiana State Bar Association petitioned the Supreme Court of Louisiana for the disbarment of petitioner and the cancellation of his license to practice law in the State of Louisiana pursuant to the provisions of Art. XV, §8, ¶7(d), Arts. of Inc., La. State Bar Ass'n, Title 37, La. Revised Statutes of 1950, as amended.

The judgment sought to be reviewed was rendered on February 28, 1977. A timely petition for rehearing was denied and the judgment of the Supreme Court of Louisiana was entered on April 7, 1977. (Appendix D) The ninety-day period allowed for the filing of this petition will not expire until July 6, 1977, however,

the Supreme Court of Louisiana has stayed issuance of its mandate only until May 17, 1977, unless this petition is filed by that date.

The statute believed to confer jurisdiction on this Honorable Court to review this case on application for a writ of certiorari is 28 U.S.C. §1257(3).

Cases believed to sustain the discretionary exercise of jurisdiction by this Honorable Court on writ of certiorari are United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217 (1967); In re Ruffalo, 390 U.S. 544 (1968). See, also, Rule 19 (1)(a), Supreme Court Rules.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves 18 U.S.C. §371, Art. 15, §8, Arts. of Inc., La. State Bar Ass'n, Title 37, La. Revised Statutes of 1950, as amended, and the Due Process

Clause of the Fourteenth Amendment to the United States Constitution. These provisions are set forth in Appendix E hereto.

THE QUESTION PRESENTED

Whether petitioner can be deprived of his right to practice law in the State of Louisiana without being afforded the opportunity to contest the validity of the finding of guilt, on the basis that the procedural rules relative to disbarment in Louisiana provide that a final conviction is unrebuttable and unassailable proof of misconduct.

STATEMENT OF THE CASE

Petitioner was convicted in the United States District Court for the Eastern District of Louisiana for conspiracy to commit mail fraud. The United States Court of Appeals for the Fifth Circuit affirmed the judgment of the District Court, sub-nom., United States

v. Perez, 489 F.2d 51 (5 Cir. 1973), and this Court denied petitioner's application for a writ of certiorari on June 10, 1974. 417 U.S. 945.

Following the denial of the petition for a writ of certiorari, the Louisiana State Bar Association, through its Committee on Professional Responsibility, filed a Petition for Disciplinary Action urging petitioner's federal conviction as grounds for disbarment. The Supreme Court of Louisiana, pursuant to Art. 15, §8(7((b), Arts of Inc., LSBA, appointed a Commissioner to conduct a hearing on the Bar Association's petition. A hearing was had before the Commissioner. Petitioner adduced evidence that had been discovered since the federal trial which demonstrated that the Government's key witness' testimony was false. This testimony was admitted subject to the objection by the Bar Association that Art. 15, §8(7)(d),

Arts. of Inc., LSBA, makes such evidence irrelevant.

In the federal proceedings, five lawyers were convicted for conspiracy to commit mail fraud. The use of the mails in most instances amounted to sending letters of representation to insurance companies or furnishing other documentation relative to automobile collisions in which the insurance companies had insured the various vehicles. Every act which was said to be criminal was merely an act which was incident to the representation of the physical participants in the collisions. It was well established that the automobile collisions were staged. Criminal responsibility of the attorneys was set through the testimony of two DeMary brothers and the wife of one of the DeMarys. At the federal trial, a defendant could assure the Court that the witness would testify. The co-defendants

all having been tried jointly with petitioner, he was unable to call the participants he represented to establish his innocence. At the hearing before the Commissioner appointed by the Supreme Court of Louisiana, testimony was adduced from co-defendants in the federal trial who had exercised their Fifth Amendment privilege not to testify in the criminal proceedings. Each of these co-defendants disputed the evidence given by the DeMary brothers and Donna DeMary, who were the key prosecution witnesses on the criminal trial. The testimony of a number of other witnesses, and the affidavits of still other witnesses, was adduced to show that the Federal conviction had been obtained on false evidence given by the DeMarys that the lawyers knew the accidents were staged. The only fact which was presented in the Federal trial which made the lawyers' conduct criminal was that of knowledge of the lawyers of

the fraudulent nature of the claims filed by them. The only source of that testimony was the DeMarys and one of their roommates, Wayne Millington (whose testimony did not affect petitioner).

Petitioner filed two separate motions for a new trial in the federal proceedings, putting forth the evidence discovered in the Bar Association proceedings as well as independently thereof. The District Court denied the motions for a new trial but, in an unanticipated move which could only have been justified by the effect the newly discovered evidence had upon the Court's belief of the defendants' guilt, probated all of the sentences to confinement. Petitioner and three other lawyers, while relieved that they would not be incarcerated, appealed the denial of their motion for a new trial. That appeal has been fixed for oral argument in the Fifth Circuit on May 16, 1977, and an opinion

should be forthcoming in a short time.

Upon the basis of the presumption of guilt, irrebuttable under Louisiana law, petitioner was disbarred in spite of proof that he was not guilty. It is upon the basis of this refusal to hear evidence to the contrary of guilt that petitioner urges he has been disbarred without due process of law.

REASONS FOR GRANTING THE WRIT

Louisiana law, making the fact of conviction an irrefutable basis for disbarment, especially in circumstances such as here where the entire basis for the conviction is exposed as a falsehood, smacks of unfairness of the first magnitude. Petitioner was permitted to present and have considered only mitigating evidence which was not inconsistent with the elements of the offense. Certainly, the most probative mitigating evidence, so far as disbarment was concerned, was the

fact that the petitioner was not guilty and that there had been a failure of justice in the Federal Courts. But such evidence was discarded and not even considered because State law treats the fact of conviction as conclusive proof of guilt of crime.

It must be remembered that in this case in the Federal Courts it was a mass trial——five lawyers, two doctors and some dozen or more laymen. The conspiracy was overwhelmingly established. The appellate standard for reviewing the denial of the petitioner's motion for a judgment of acquittal was the "slight evidence" standard. Once the existence of the conspiracy was proved beyond a reasonable doubt, the Court of Appeals sanctioned the convictions of each co-defendant for whom there was even "slight evidence" of guilt. This standard of review, first of all, smacks of a

dimination of the reasonable doubt standard of proof which this Court required in In re Winship, 397 U.S. 357 (1970). To have based disbarment on a judgment obtained in derogation of this important constitutional standard, especially in the fact of proof of the falsity of the "slight evidence" upon which the conviction was based, itself violates the constitutional prohibition against unwarranted conclusive presumptions. See Leary v. United States, 395 U.S. 6 (1967). How much more unfair could it be than, in a situation such as this where the presumed fact was refuted, the conclusive presumption was applied?

It is recognized that there is a sufficient legal basis for sustaining the action of the Supreme Court of Louisiana in this case. Even this Court refused to review the Federal conviction. But the thrust of this petition is not the suf-

ficiency of the legal basis but the unfairness of the procedure which will ignore the fact of innocence and deprive a man of his right to earn a living in the profession which he has chosen and which he has never dishonored. It is to the sense of justice and fairness that petitioner appeals to Your Honors to reverse the judgment of the Supreme Court of Louisiana and to require the Supreme Court of Louisiana to hear and evaluate the evidence contrary to guilt of the petitioner.

CONCLUSION

For the foregoing reasons, this Court should grant this application for a writ of certiorari.

Respectfully submitted,

ERNEST C. HAMILTON

PROOF OF SERVICE

I, Ernest C. Hamilton, an attorney and the Petitioner pro se, depose and say that on the 17th day of May, 1977, I served a copy of the foregoing Petition on the Louisiana State Bar Association, Respondent herein, through its Committee on Professional Responsibility, directed to the attention of Mr. Thomas O. Collins, Jr., Counsel, by placing the same in an envelope addressed to Mr. Collins at his office located at 225 Baronne, Suite 210, New Orleans, Louisiana, with first class postage prepaid.

ERNEST C. HAMILTON
Petitioner pro se

Sworn to and subscribed before me this ___ day of May, 1977.

NOTARY PUBLIC
My Commission is Issued for Life.

May 22, 1977

Mr. Ernest C. Hamilton
1131 Pithon Street
Lake Charles, Louisiana

Re: No. 55,435
Louisiana State Bar Association v. Ernest C. Hamilton

Dear Sir:

In reference to your application for extension of stay of mandate which was filed on this date, the following order was handed down:

"The original order for stay until May 2, 1977 is hereby extended to May 17, 1977."

With kindest regards, I am,

Very truly yours,

Harold A. Moise, Jr.
Clerk

s/ Andrew J. Falcon
By: Deputy Clerk

(A true copy of this letter, sealed by the Supreme Court of Louisiana, is submitted herewith as an independent exhibit.)

APPENDIX A

APPENDIX B

LOUISIANA STATE BAR
ASSOCIATION

-v-

Ernest C. HAMILTON.

No. 55435

Supreme Court of Louisiana
Feb. 28, 1977

Rehearing Denied April 7, 1977.

DISCIPLINARY PROCEEDINGS

CALOGERO, Justice

The Louisiana State Bar Association, through its Committee on Professional Responsibility, instituted this disciplinary proceeding against Ernest C. Hamilton, a member of the bar of this state. The Committee in its petition relies upon the authority of Article 15, section 8 of the Articles of Incorporation of the Louisiana State Bar Association, as effective September 1, 1971, and is based upon respond-

ent's conviction in federal court for conspiracy to commit mail fraud in violation of 18 U.S.C. §§371, 1341. This Court has original jurisdiction over these proceedings as provided in Article VII, section 10 of the Louisiana Constitution of 19 21.[1]

On April 3, 1967, Ernest C. Hamilton, re
respondent herein, was indicted along with certain other persons by the grand jury for the United States District Court for the Eastern District of Louisiana for conspiracy to commit mail fraud.[2] On December 18, 1970, after a trial lasting almost two months,

1. At the time the petition for disciplinary action was filed by the Louisiana State Bar Association on October 11, 1974, the 1921 Constitution was still in effect. The pertinent jurisdictional authority is now contained in Article V, section 5 of the Louisiana Constitution of 1971.

2. Many of the participants were charged and convicted of substantive violations of the mail fraud statute, 18 U.S.C. §371, as well as with conspiracy to commit mail fraud, 18 U.S.C. §§371,1341. One of the other attorneys indicted, Lloyd Hennigan, was convicted only of the conspiracy count, although he was charged with both substantive and conspiracy counts. Respondent herein, however, was charged with and convicted of only the single conspiracy count.

respondent and a number of his co-defendants were found guilty as charged. Respondent Hamilton was thereafter sentenced to serve three years in prison, which sentence was later amended to three years active probation. Respondent's conviction was upheld by the Fifth Circuit Court of Appeals. *United States v. Perez*, 489 F.2d 51 (5th Cir. 1974). His application for writ of certiorari was denied by the United States Supreme Court on June 10, 1974. 417 U.S. 945, 94 S.Ct. 3067, 41 L.Ed.2d 664 (1974).

On October 11, 1974, a petition for disciplinary action against respondent was filed with this Court. In response to that petition, respondent filed various exceptions to the proceedings, which this Court ordered referred to the merits. Respondent then answered the petition by way of a general denial, affirmatively asserting, however, that he was innocent of the charges for which he stood convicted and giving notice that he intended to produce evidence of mitigating circumstances.

On December 11, 1975, a hearing was held before LeDoux R. Provosty, Jr., the Commissioner appointed by this Court to conduct the proceedings. Arts. of Incorp., La. State Bar Assn., art. 15, §8(7)(b)(1971). At the hearing, the Committee on Professional Responsibility introduced into evidence the original petition for disciplinary action, the certificate of conviction of the United States District Court for the Eastern District of Louisiana, and a photostatic copy of theFifth Circuit opinion in the case of *United States v. Perez, supra.*

At the hearing, respondent testified in his own behalf and presented three other witnesses: David McGee and Mayo Perez, two of his clients in one of the automobile accidents which formed the basis of his conviction for conspiracy to commit mail fraud[3]

3. The government based its overall indictment on nine allegedly fraudulent automobile collisions. Respondent Hamilton represented participants in two of these accidents: McGee and Perez, who were involved in a November 3, 1966 accident in Bossier City, Louisiana, and Winfred Spell and Ann DeVille, who were involved in March 10, 1965 accident in Pineville, Louisiana.

as well as Mary Smith Hamilton, his wife. Respondent also proffered the transcripts of testimony of other co-defendants and other persons who had testified in previous committee disciplinary hearings, as well as the twenty-two volumes of trial transcript in the federal criminal proceedings. Likewise, he introduced into evidence admitted subject to certain Commission objections, the following: his original office files in the two cases which formed the basis of his conviction, several letters of character reference, and certain documents relating to respondent's motion for a new trial in federal court. It is this evidence which constitutes the record in this proceeding.

The federal crime on which respondent's conviction was based involved a scheme wherein a group of lawyers, doctors, and laymen defrauded insurance companies by staging fake accidents and then collected insurance

settlements on the basis of false and/or exaggerated injuries. Their use of the United States mails offered the basis on which they were convicted in federal court for violations of the mail fraud statute. The scheme is described more fully in *United States v. Perez, supra*. Respondent Hamilton was charged and convicted on the basis of his participation in two of the staged automobile accidents. See Footnote three. Several attorneys were involved in the overall scheme, three of whom have already been disbarred by this Court. *Louisiana State Bar Ass'n v. Loridans*, 338 So.2d 1338(La.1976)[hereinafter *Loridans*];*Louisiana State Bar Ass'n v. Shaheen*, 338 So.2d 1347(La.1976);*Louisiana State Bar Ass'n v. Hennigan*, 340 So.2d 264(La.1976).

In response to the Committee's petition for disbarment in this Court, respondent filed exceptions of no cause of action, no right of action, prematurity and vagueness;

they were referred by this Court to the merits.

[1] Respondent first argues that the petition fails to state a cause of action or a right of action because the provision under which the Committee proceeded, Article 15, section 8 of the Articles of Incorporation of the Louisiana State Bar Association, as amended, was effective September 1, 1971, and therefore could not apply to a crime committed prior to the adoption and effective date of the Article. He asserts that the application of this article to the crime he committed during the years 1965 and 1966 constituted a bill of attainder and an ex post facto law in violation of the state and federal constitutions.

The misconduct complained of by the Committee occurred during the years 1965 and 1966. At that ime, a felony conviction was not, in itself, a ground for disbarment because it was the underlying miscondict, not merely the fact of criminal conviction for

the misconduct, which gave grounds for a lawyers's disbarment. *Louisiana State Bar Ass'n v. Connolly*, 201 La. 342, 9So.2d 582 (1942); *Louisiana State Bar Ass'n v. Leche*, 201 La. 293, 9 So.2d 566 (1942). Respondent therefore complains that our previous rulings on this subject in *Louisiana State Bar Ass'n v. Edwards*, 322 So.2d 123 (La. 1976) and *Louisiana State Bar Ass'n v. Ponder*, 263 La. 743, 269 So.2d 228 (1972) incorrectly set the date of conviction, rather than the date of the act of misconduct, asthe pivotal date for rights and liabilities to attach under the Articles of Incorporation. We find no merit to this argument. It is the conviction of a crime which give rise to these disciplinary proceedings. Thus, it is the date of that conviction which determines whether the Committee should proceed under the former articles or the current ones. *Loridans, supra Louisiana State Bar Ass'n v. Edwards, supra;*

Louisiana State Bar Association v. Ponder, *supra*. Because respondent's conviction became final on June 10, 1974, the date on which the United States Supreme Court denied his application for writ of certiorari, his conviction became final well after the current Articles became effective in September of 1971, and the Committee properly proceeded thereunder.

[2] Respondent secondly filed an exception of prematurity, contending that the Association has failed to comply with Article 15, section 8 of the Articles of Incorporation. He contends that this provision requires an initial determination by the Association that the crime involved constitutes a "serious crime," a finding that he says must be concurred in by this Court before disciplinary proceedings are instituted.

We have earlier dealt with this same contention in *Loridans*, *supra*. There, after

more fully setting out the provisions of Article 15, section 8, we concluded that:

"Viewing the provisions of section 8 of article 15 in their entirety, it is clear that they call for an initial determination by the committee of the seriousness of the crime in the interim period after conviction but before finality of judgment by exhaustion of appeals. Such a preliminary determination allows for the suspension of an attorney during this time and thus affords better protection to the public and the courts. While the current Articles of Incorporation do provide for these preliminary steps, in the instant case we see no substantial violation of respondent's rights by the failure of the Committee to take them. If that procedure had been followed, respondent would possibly have been under suspension during the five to six year period between his conviction in federal court and the present determination by this court with respect to respondent's disbarment. Instead

he continued to practice law. Here the committee did not opt to proceed against respondent prior to the finality of his conviction. For whatever reasons they chose to wait, in our view their decision not to take any preliminary steps to discipline respondent does notgive rise to any defense on his part to the initiation of the proceedings after his appeals have been exhausted and his convictionhas become final." *Loridans*, *supra*, 338 So.2d at 1348.

The same reasoning applies to respondent Hamilton's exception of prematurity.

[3] Respondent's final exception complains that the petition is so vague and indefinite as to fail to inform him of the nature and cause of the accusation brought against him in sufficient particularity so that he may prepare his defense thereto. The language he attacks is the petition allegation that "the crimes[4] of which respondent stands convicted have been determined by the Committee to be felonies and serious crimes and such as reflect upon the Respondent's moral fitness to practice law."

4. The original petition and Commissioner's report

The petition sets out that respondent was found guilty by a jury on December 18, 1970, of violating 18 U.S.C. §§371, 1341 and specifies that this crime is conspiracy to commit mail fraud. The facts that the conviction was affirmed by the Fifth Circuit Court of Appeals and that the United States Supreme Coqrt denied writs on his conviction are likewise included. Attached and make part of the petition is a certified copy of the certificate of conviction as well as a photostat of the Cifth Circuit opinion which sets out in detail the dates, places, and participants in those accidents found to be fraudulent in which respondent was involved. Also, the three overt acts of which respondent was

mistakenly related that respondent had been convicted of two crimes, violations of the substantive law of mail fraud as well as conspiracy to commit mail fraud. The Committee has amended its report so as to correct this error.

accused are specifically set out there, as well as details of the entire scheme.

There simply can be no doubt that this petition stated with sufficient particularity the serious nature of the crime of which respondent sttod convicted. Although a petition for disbarment on the basis cf a crime in some circumstances mifht be vague if it failed to particularize how the commission of the crime affected a petitioner's moral fitness to practice law, certainly here there is no such problem because the insurance fraud scheme itself—described with particularity in the appellate opinion— strikes atthe very heart of the legal profession: the use of his skills as a lawyer to fraudulently deprive insurance companies of money by means of fake claims is anathema to a profession the most significant attribute (indeed justification) of which is integrity and trust. *See Louisiana State Bar Ass'n v. Shaheen, supra.* For this reason, we find that the petition for disciplinary action filed

against Ernest Hamilton does not, because of its vague ness, generality, or indefiniteness, fail to inform him sufficiently of the nature and cause of the accusation against him so that he might prepare his defense.

Having dealt with each of the exceptions filed by respondent and having found them meritless, we turn now to the exceptions he has filed to the report of the Commissioner. The first of these urges that the Commissioner erred in failing to grant his motion for a directed verdict dismissing the petition filed by the Committee.

At the hearing, the Committee introduced into evidence the petition for disciplinary action, which, as recited previously, had appended to it a copy of the certificate of conviction and a photostatic copy of the Fifth Circuit opinion. The respondent then moved for a directed verdict on the grounds that the Committee had failed to introduce

any evidence that respondent had committed a "serious crime," as he alleges is made necessary under Article 15, section 8 of the Articles of Incorporation. Respondent claims that this failure obviated his having to introduce evidence regarding the serious or non-serious nature of the crime.

The "serious crime" language appears in subsection (1)-(6), section 8 of Article 15 which deals with suspension after conviction of a crime but prior to finality thereof. The language of Article 15 which relates to the disbarment stage of disciplinary proceedings, and correspondingly the matter presently before this Court, appear in subsection (7)(d) of Article 15—"the sole issue to be determined shall be whether the crime warrants discipline, and if so, the extent thereof." It is of course true that conviction of a crime no doubt would not warrant discipline, certainly significant disciplinary action, unless it were serious. Nonetheless the issue in this proceeding is simply whether

the crime warrants discipline. This central issue in these proceedings we shall discuss hereinafter.

[4] There is no merit to respondent's claim that, because no evidence was introduced by the Committee to show the crime was serious, he was improperly denied a directed verdict.[5]

Next, respondent argues that the Commissioner erred in failing to admit the

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5. On the question of the serious nature of the crime, however, we deem it worth noting what the Commissioner had to say in this regard:

"That the crime of which Respondent stands convicted involves misconduct or moral turpitude, there can be no question. The participation by respondent in an activity described by Judge Brown as an "American tragedy. . . ., the Louisiana-wide-get-rich-quick scheme invilving the staging of fraudulent automobile accidents for the purpose of creating false personal injury claims, constitutes a most blatant breach of legal professional ethics. [United States v. Perez, supra.] Not only do we have an instance whereby an attorney has debased his profession by practicing same in a manner designed to fraudulently obtain funds from insurance companies, but one in which an attorney has attempted to make the courts an unwilling accomplice. Such conduct evidences a remarkable lack of regard not only for the law but for our constitutional system of justice. Participation by an officer of the court in such conduct simply cannot be tolerated."

testimonial and documentary evidence proffered by respondent. We are not told exactly which evidence it is respondent complains about, but we note from the record of the hearing that there were many documents proffered but not allowed introduced into evidence including the entire twenty-two volumes of testimony in the federal court as well as other evidence as previously described. Some of the same evidence and similar evidence were proffered at the Committee hearings of the other lawyers involved in this same criminal action. In dealing with this issue, we have previously stated that: "[A]rticle 15, section 8, paragraph 7(d) of the Articles of Incorporation of the Louisiana State Bar Association provides as follows:

'At the hearing based upon the respondent's conviction of a crime the sole issue to be determined shall be whether the crime warrants discipline, and if so, the extent thereof. At the hearing the respondent may offer evidence only of mitigating circumst-

ances not inconsistant with the essential elements of the crime for which he was convicted as determined by the statute defining the crime.' (Emphasis added.)

"In addition, article 15, section 8 paragraph 7(c) states that 'the certificate of the conviction of the respondent shall be conclusive evidence of his guilt of the crime for which he has been convicted. These provisions were clearly designed to put an end to an examination of respondent's guilt or innocence of the crime of which he has already been convicted and to pe-mit only the introduction of mitigating circumstances that are not inconsistent with that guilt.

* * * * *

"One of the essential elements of mail fraud as set forth in 18 U.S.C. §1341, is a conscious, knowing intent to defraud. *United States v. Payne*, 474 F.2d 603 (9th Cir. 1973); *United States v. Koening*, 388 F.Supp. 670 (S.D.N.Y. 1974). In addition, one of the essential elements of the crime of conspiracy

to violate a criminal law is knowledge and intent. *See United States v. Feola*, 420 U.S. 671, 95 S.Ct. 1255, 43L.Ed.2d 541 (1975); *United States v. Garafola*, 471 F.2d 291 (6th Cir. 1972); *United States v. Koening supra.* As noted by the United States Court of Appeals, Fifth Circuit, in its opinion affirming respondent's conviction, *United States v. Perez, supra*, at 61, 62:

'A review of the record has convinced us that the evidence adduced, both direct and circumstantial was adequate to warrant the inference that all of the participants had entered into this concerted program. To conspire is to agree—the presence of an agreement is the primary requirement for the establishment of a conspiracy, the commission of an overt act in furtherance being attendant.

* * * * *

'Here, there was direct, positive testimony, if credited, from which the jury could find that each of the defendants appellants here

were participants in one overall conspiracy With hardly any exception, the testimony squared with the common sense of the scheme.'

"To permit respondent to offer evidence at his hearing before the Committee on Professional Responsibility tending to show his lack of knowledge and/or intent would be to admit evidence 'inconsistent with the essential elements of the crime for which he was convicted. . . .' In direct conflict with the terms of article 15, section 8, paragraph 7(d) of the Articles of Incorporation of the Louisiana State Bar Association. We therefore conclude that the testimony [at issue] insofar as such testimony seeks to negate any knowledge or intent on the part of respondent, was inadmissible at the hearing and will be disregarded by this Court. To hold otherwise would require this Court to retry respondent despite the fact that he was convicted after trial by jury, and despite the fact that his conviction was affirmed on appeal. It would also be in contravention of

the specific language of the Articles of Incorporation that 'the certificate of the conviction of the respondent shall be conslusive evidence of his guilt of the crime for which he has been convicted.'

"The foregoing discussion is not intended to foreclose an inquiry into the facts surrounding the commission of the offense insofar as they reflect upon the character or quality of the criminal conduct or a respondent's degree of complicity therein. *See Louisiana State Bar Association v. Edwards*, 322 So.2d 123 (La.1975). It merely indicates that the refence to 'mitigating circumstances' does not relate to mitigating circumstances with respect to respondent's guilt or innocence of the crime, or with respect to the essential elements of that crime, but rather relates to mitigating circumstances which appropriately bear upon 'whether the crime warrants discipline and, if so, the extent thereof.' Thus evidence of 'mitigating circumstances not inconsistent with the essential elements of the

crime' would include the character of the misconduct on which the conviction was based and, in appropriate cases, the degree of respondent's complicity, as well as evidence relative to the reputation of respondent, his post-conviction conduct, the regard in which he is held by members of the legal profession and the community in which he resides, family circumstances and the like." *Loridans, supra,* 338 So.2d at 1344.

[5] Our holding there governs this case. While respondent may introduce evidence at the hearing which reflects upon the character or quality of the criminal conduct or on his degree of complicity therein, he may not introduce or rely upon, for exculpatory purposes evidence which relates only to his guilt or innocence of the crime, or to the essential elements of the crime. We have studied all of the evidence proffered at the hearing. Those materials which are merely exculpatory in nature and which go only to the guilt or innocence of respondent for the crime of which

he was convicted we have disregarded because the determination as to his guilt is final and no further inquiry into that conviction may be made. Some of these materials also contain, however, evidence of the "character of the misconduct on which the conviction was based," as well as "the degree of respondent's complicity." *Loridans, supra,* at 1345. Since we have examined the evidence which was proffered, we find no prejudice to respondent in the Commissioner's complained-of failure to allow respondent to formally introduce those documents into evidence.

The Commissioner recommended to this Court that "respondent's crime bespeaks of his moral unfitness to practice law and calls for his disbarment as an appropriate disciplinary action." Respondent's final argument, and the one he fully briefs, in his contention that the evidence adduced at the hearing is insufficient to warrant disbarment.

[6] In this regard, he argues initially that he in fact had no knowledge that the col-

lisions in which he represented claimants were fraudulent. Such an argument is not appropriate in this disciplinary proceeding because knowledge is an essential element of the crime of conspiracy to commit mail fraud and respondent's final conviction for that crime precludes further inquiry into the question of Hamilton's knowledge, or lack of it, of the fraudulent nature of the collisions. *Loridans, supra.*

Respondent further argues, however, that this Court, in its determination of "whether the crime warrants discipline, and if so, the extent thereof," pursuant to Article 15, section 8(7)(d) of the Articles of Incorporation, should examine these facts: that he was charged with being involved in only one of the nine collisions,[6] that the overt acts he was charged with committing are wholly consistent with innocent representation

6. Actually, respondent was charged with being involved in two of the collisions. See note 3.

of legitimate clients; that he withdrew from the prosecution of the second fraudulent claim; and that he did not profit financially from his participation in this scheme.[7] Also, he introduced evidence that he is fifty-two years of age with two small children, a wife, and an aged mother almost totally dependent on him for support; that a disbarment would cause financial and emotional hardship to him and his family; that even after his indictment and conviction he was held local and national offices in the Veterans of Foreign Wars. Additionally, he states that his case is different from the disciplinary proceedings against attorneys Shaheen, Hennigan and Loridans because each of them was charged in at least one substantive count, while he was charged only in the conspiracy count and because, according to him there was substantive proof of their knowing complicity in the

7. In support of his contention that he did not profit from the scheme, he sets forth that what fee he earned in the first case was offset by [no hiatus].

scheme while there was only an inference adduced as to his own knowledge of the conspiracy.

[7,8] Although most of the factors respondent urges us to consider are properly before us as mitigating circumstances, some of these factors, particularly the assertion as to proof of respondent's knowledge of the fraudulent aspect of these collisions, will not be considered by this Court because any inquiry into an essential element of the crime, such as knowledge, is foreclosed by the final conviction. When we weight the mitigating factors against the gravity of the offense and its direct relationship to perversion of the attorney's integrity and professional responsibility, we conclude that the proper disciplinary action in this case is disbarment. As we have noted previously *see Louisiana State Bar Ass'n v. Shaheen, supra,* the disbarment of an attorney is not so much for punishment of the attorney as it is for preservation of the integrity of the courts

and the salutary effect it has upon other members of the bar. We are convinced that the participation of respondent in this illegal scheme far outweighs those factors he urges in mitigation, and we see no substantial difference between his participation in the scheme and that of the other attorneys involved. We therefore accept the recommendation of the Commissioner that under the circumstances of this case the appropriate disciplinary action is disbarment.

For the reasons assigned, it is ordered, adjudged and decreed that Ernest C. Hamilton be and hereby is disbarred from the practice of law in Louisiana on and after the date of this decree and that, accordingly, his license to practice law be cancelled. Respondent is to bear all costs of this proceeding.

TATE, J., is recused, having served as a character witness.

DENNIS, J., dissents for the reasons st stated in LSBA v. Shaheen, 338 So.2d, 1347 (La.1976).

ON APPLICATION FOR REHEARING

PER CURIAM.

Rehearing denied. State v. Fourchy, 106 La. 743, 31 So. 325 (1901), relied on by defendant,is distinguishable from the case at bar.

TATE, J., recused.

DENNIS, J., is of the opinion a rehearing should be granted.

DENNIS, Justice (dissenting).

I fully agree that disciplinary action must be taken against the respondent. I will even concede that perhaps he should be disbarred. However, I cannot approve the result of this proceeding, because in my opinion it was achieved without affording the respondent due process of law.

As the majority opinion correctly reflects, disciplinary proceedings were commenced against respondent because of his conviction in federal court of mail fraud and conspiracy to commit mail fraud. The principle crime is defined by 18 U.S.C. § 1341, as follows:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or

> authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both."

In essence, the crime could involve a swindle of anything from a few cents to millions of dollars through use of the mails.

The main thrust of Shaheen's defense was that his degree of culpability was not sufficient to warrant disbarment, because he was only peripherally involved in a scheme perpetrated by others. The respondent attempted to prove this by offering testimony, affidavits and transcripts. But this evidence was given little, if any, regard by the Commissioner because he concluded that "the question of the degree of knowledge on the part of [Shaheen] is not properly at issue" and that no evidence which tended to disprove Shaheen's guilt of any aspect of the crimes of which he was convicted could be considered. The Commissioner stated that his decision in this regard was dictated by Article XV, § 8(7)(d) of the Louisiana State Bar Association Articles of Incorporation, which provides:

"(7) After the conviction has become final, that is, all appeals have been concluded or exhausted, the procedure shall be as follows:

"* * *

"(d) At the hearing based upon a respondent's conviction of a crime, the sole issue to be determined shall be whether the crime warrants discipline, and if so, the extent thereof. At the hearing the respondent may offer evidence only of mitigating circumstances not inconsistent with the essential elements of the crime for which he was convicted as determined by the statute defining the crime."

The majority opinion, as I understand it, has adopted the Commissioner's interpretation of the article.

I do not agree with this interpretation. Standing alone the last quoted sentence, of course, can be given such a construction. However, it would be at odds then with the preceding sentence, which sets forth the principal duty of this Court in this kind of disciplinary proceeding, and that is to determine "whether the crime warrants discipline, and if so, the extent thereof." Instead, I would construe the entire section to allow the respondent to introduce evidence, not to totally disprove his guilt, but in order to show that the degree of his culpability is not as great as that which might be inferred from the face of the judgment of conviction against him. It is conceivable that the circumstances under which an attorney has participated in the wrongful conduct of a client might be such that

moral turpitude would be slight and yet the attorney might be guilty in fact and in law of a crime. Such a situation might justify less drastic action than permanent disbarment of the attorney. *See, In re Tinkoff*, 101 F.2d 341 (7th Cir. 1939). Cf. *La. State Bar Association v. Ponder*, ___ So.2d ___ (La.1976). (After considering evidence in mitigation of *guilt* the Court suspended an attorney for six months following his conviction of making false income tax returns). If we do not recognize this possibility and allow the consideration of evidence tending to prove it, I simply do not see how we can intelligently determine the extent to which an attorney's crime warrants discipline.

On the other hand, if the article of incorporation cannot be construed as suggested, I would have no recourse but to find the sentence barring introduction of evidence mitigating the degree of guilt unconstitutional as denying due process under both the federal and state constitutions.

The right to hold specific employment and to follow a chosen profession free from unreasonable governmental interference comes within the "liberty" and "property" concepts of the Fifth Amendment to the United States Constitution. *Greene v. McElroy*, 260 U.S. 474, 79 S.Ct. 1400, 3 L.Ed.2d 1377 (1959); *Dent v. West Virginia*, 129 U.S. 114, 9 S.Ct. 231, 32 L.Ed. 623 (1889); *Schware v. Board of Bar Examiners*, 353 U.S. 232, 77 S.Ct. 752, 1 L.Ed.2d 796, 64 A.L.R.2d 288 (1957); *Peters v. Hobby*, 349 U.S. 331, 352, 75 S.Ct. 790, 99 L.Ed. 1129, 1144 (1955) (concurring opinion); cf. *Slochower v. Board of Higher Education of City of New York*, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692 (1956); *Truax v.*

Raich, 239 U.S. 33, 41, 36 S.Ct. 7, 60 L.Ed. 131 (1915); *Allgeyer v. Louisiana*, 165 U.S. 578, 589, 590, 17 S.Ct. 427, 431, 41 L.Ed. 832, 835, 836 (1897); *Powell v. Pennsylvania*, 127 U.S. 678, 684, 8 S.Ct. 992, 995, 32 L.Ed. 253, 256 (1888). Moreover, the requirements of procedural due process must be met before a state can exclude a person from practicing law, including a full and fair hearing in which that person is given an opportunity to contest the bases of the recommendations against him. *Willner v. Committee on Character & Fitness*, 373 U.S. 96, 83 S.Ct. 1175, 10 L.Ed.2d 224 (1963). The Louisiana Constitution of 1974 grants each citizen equally broad protection of liberty in the pursuit of a profession as well as his right to due process and a fair hearing before any governmental restriction may be placed thereon:

La.Constitution Article I, § 2 provides:

> "No person shall be deprived of life, liberty, or property, except by due process of law."

La.Constitution Article I, § 19 provides:

> "No person shall be subjected to imprisonment or forfeiture of rights or property without the right of judicial review based upon a complete record of all evidence upon which the judgment is based. This right may be intelligently waived. The cost of transcribing the record shall be paid as provided by law."

In reaching the decision to disbar Philip Shaheen the Commissioner and this Court did not follow the requirements of the article of incorporation, as correctly interpreted, and certainly did not heed the precepts of our constitutional law. Insofar as I have determined, neither this Court nor the Commissioner has reviewed the record of the federal trial which led to the respondent's convictions, although this evidence was available to both. This record undoubtedly contains evidence relevant to the degree of his culpability in the form of testimony in his favor as well as cross-examination of the witnesses against him. Instead of reviewing this evidence, the Commissioner and the Court merely accepted as proven those facts stated in the Fifth Circuit Court of Appeals opinion. With all due respect to the able author of that opinion, there are several reasons it should not be used as a basis for our judgment of the extent of discipline warranted in this case. The author was not authorized by our constitution or laws to act as a finder of fact in Louisiana attorney disciplinary proceedings. His function in preparing the opinion was not that of a trier of fact, but that of a federal appellate judge assembling the evidence which would reasonably support the jury's verdict. In doing so, it may have been unavoidable for him to emphasize some of the most damning evidence against the respondent while properly considering it unnecessary to recite any mitigating evidence in his favor. An independent review of the record of respondent's trial by the Commissioner and this Court would have required some additional effort but not a retrial of the case as suggested by the Commissioner's report and the majority opinion. It seems that in order to afford a fair hearing or its equivalent this is

the least that should have been done before stripping respondent of his right to practice law and thereby grievously injuring him, his wife, his five children, and his dependent mother. In concentrating their attention on the federal court of appeals opinion, and in refusing to consider the evidence offered by respondent to show that his involvement in the unlawful scheme was limited, the Commissioner and this Court have deprived respondent of liberty and property without due process of law and may have committed a grave injustice.

I respectfully dissent.

SUPREME COURT OF LOUISIANA

NO. 55,435

LOUISIANA STATE BAR ASSOCIATION

VERSUS

ERNEST C. HAMILTON

ON APPLICATION FOR REHEARING

PER CURIAM:

Rehearing denied. State v. Fourchy, 106 La. 743, 31 So. 325, 1901, relied on by defendant, is distinguishable from the case at bar.

TATE, J., recused.

DENNIS, J., is of the opinion a rehearing should be granted.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

18 U.S.C. §371 provides:

If two or more persons conspire to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

Article 15, §8, ¶7(d), Articles of Incorporation of the Louisiana State Bar Association, Title 37, Louisiana Revised Statutes of 1950, provides:

At the hearing based upon a respondent's conviction of a crime, the sole issue to be determined shall be whether the crime warrants discipline, and if so, the extent thereof. At the hearing the respondent may offer evidence only of mitigating circumstances not inconsistent with the essential elements of the crime for which he was convicted as determined by the statute defining the crime.

The Due Process Clause of the Fourteenth Amendment provides:

* * * nor shall any State deprive any person of life, liberty, or property, without due process of law.

APPENDIX E